FILED
JAN 27 1995
OFFICE OF THE CLERK

No. 94-1176

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

PORTER COUNTY PLAN COMMISSION
and COUNTY OF PORTER

Petitioners,

v.

ELIZABETH MARSHALL,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Rosalie B. Levinson
122 W. 79th Ave.
Merrillville, IN 46410
(219) 769-1164

Ivan E. Bodensteiner
7 Napoleon Street
Valparaiso, IN 46383
(219) 464-1162
Counsel of Record

Attorneys for Respondent

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QUESTION PRESENTED

Whether the Court of Appeals properly applied the controlling decisions of this Court in determining that a policymaker, the executive secretary of the plan commission, who speaks out about abuse of public office and wrongdoing by members of the county plan commission and the county building inspector, is protected from a retaliatory discharge by the first amendment, thereby precluding review on writ of certiorari under Rule 10 of the Rules of this Court?

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JURISDICTION

The judgment of the Court of Appeals was entered on August 23, 1994 and the petition for rehearing was denied on September 30, 1994. Jurisdiction of this Court is based on 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1343.

STATEMENT OF THE CASE

In 1984, after serving on the Porter County Plan Commission (PCPC), Ms. Marshall was appointed to the top staff position, Executive Secretary, of the PCPC. **(Tr. 42-43)** At the beginning of each of the next six (6) years, 1985-90, Ms. Marshall was reappointed as Executive Secretary by the PCPC. **(Tr. 44)** During this period, Ms. Marshall was never given any indication that her performance was less than satisfactory. **(Tr. 44-45)** Her performance had not deteriorated. **(Tr. 199; 289-90)** At a meeting of the PCPC held on January 9, 1991, it accepted the recommendation of the Nominating Committee and reappointed Ms. Marshall to a limited term of approximately four (4) months. **(Tr. 60-61; 187-89)** No reasons were given to Ms. Marshall, by either the Nominating Committee or the PCPC, for the limited reappointment. **(Tr. 184-85)** Ms. Marshall was never advised of areas in which she needed to improve in order to retain her job. **(Tr. 271)**

At an executive session held on March 11, 1991, the PCPC decided to discharge Ms. Marshall and this decision was communicated to her by the PCPC attorney, Mr. Hurley. **(Tr. 81; 351-53)** The formal decision to discharge Ms. Marshall was made two (2) days later at a public meeting of the PCPC held on March 13, 1991. **(Tr. 81-82)** Again, no reasons were given for the discharge prior to the 7-2 vote against Ms. Marshall. **(Tr. 82)**

The Porter County Board of County Commissioners (Board), a three-member board, appoints one (1) of its members **(Tr. 192)** and five (5) additional persons to the PCPC. The Board also appoints the County Building Inspector **(Tr. 192-93)**, who operates out of the PCPC office **(Tr. 154)**, and in early 1989 Mr. Weltz was appointed to this position. Shortly after Mr. Weltz became building inspector, around mid-1989, Ms. Marshall raised some questions about his performance, including what she believed to be excessive claims for mileage, with one of the Board members, Mr. Carmichael. **(Tr. 47-50)** She also raised these and other concerns with the PCPC Policy Committee **(Tr. 50-51; 55-56)** and with Mr. Brown, President of the PCPC **(Tr. 280-82)**, who

appeared at a meeting of the Board **(Tr. 75-77)** and read a statement **(plaintiff's exhibit # 1)** concerning Mr. Weltz's poor performance. **(Tr. 280-85)** At a PCPC meeting on December 11, 1990, Ms. Marshall presented the PCPC members with a list of complaints/concerns about Mr. Weltz, including his excessive mileage, his partisan political activity at the PCPC office while he was paid to work on county matters, and his failure to make required building inspections. **(Tr. 57-58; 104-05)** She presented a list **(plaintiff's exhibit # 2)** showing that around one-half of the required inspections were not performed. It was within a month of this meeting that the PCPC reappointed Ms. Marshall to a limited term, instead of a full year. **(Tr. 60-61)**

In mid-December 1990 Ms. Marshall learned that a court had upheld the Porter County Board of Zoning Appeals' (BZA) denial of a variance requested by a Mr. Putz. **(Tr. 67; 144)** She then contacted Mr. Putz and advised him of a meeting of several members of the BZA, including Mr. Detert and Mr. Fike, held prior to the scheduled public meeting at which his request for a variance was to be considered, in violation of the Indiana open

door law. **(Tr. 68)** Mr. Putz advised her not to pursue the issue because Mr. Detert is a very "vindictive" man. **(Tr. 68-69)** Mr. Fike admitted to a conversation prior to the public BZA meeting, but denied Ms. Marshall's version. **(Tr. 385-87)**

By early 1991 it became apparent to Ms. Marshall that the house built by Mr. Putz might have to be removed because it extended over the property line and the variance had been denied. **(Tr. 67-70)** She believed that the issue could be discussed at an executive session, set for January 21, 1991, but when the meeting was cancelled, Ms. Marshall contacted Mr. Hurley, attorney for both the PCPC and the BZA, to arrange a meeting to discuss it with him. **(Tr. 69)** She met with Mr. Hurley in late January 1991 **(Tr. 70-71)** and informed him that three (3) members, including Mr. Fike and Mr. Detert, of the five-member BZA met secretly, in violation of the Indiana open door law, prior to the public meeting at which Mr. Putz's request for a variance was considered and decided to "get" Putz. **(Tr. 68; 71; 115)** She asked Mr. Hurley to take action to correct the impropriety and avoid removal of the house. **(Tr. 71)** When Mr. Hurley indicated that he would not

take action because the BZA had already prevailed in court and would prevail on appeal **(Tr. 71)**, Ms. Marshall contacted the attorney for Mr. Putz **(Tr. 72)** and provided him with an affidavit **(plaintiff's exhibit # 6)** explaining the meeting she had observed. **(Tr. 74)** Shortly thereafter Mr. Putz filed a lawsuit alleging a violation of the state open door law and the case was promptly settled. **(Tr. 348-50; 414-15)**

Mr. Sheets, a member of both the Board and the PCPC, testified that it was impossible for him to gather enough votes to save Ms. Marshall's job after the Putz affidavit was disclosed. **(Tr. 197-98)** In fact, on March 11, 1991, Ms. Marshall was notified that she would be discharged. **(Tr. 81; 351-53)** Mr. Bengel testified that the Putz matter was a factor in his and other PCPC members' decision to discharge Ms. Marshall. **(Tr. 202)**

The complaint **(Record (R.) # 1)** was filed on May 6, 1991 against the PCPC, Porter County, and seven (7) members of the PCPC. In it Ms. Marshall alleged that she was discharged in violation of the first amendment to the U.S. Constitution because she raised questions about several matters of public concern. In a

motion for summary judgment filed before trial, the defendants argued, as they do here, that policymakers do not enjoy a first amendment right to speak out on matters of public concern. The trial court, finding no basis for such an extension of **Elrod/Branti** **(App. at 40)**, denied the motion and, applying **Pickering/Connick**, found that Ms. Marshall's speech addressed a matter of public concern and that the defendants failed to carry their burden of showing the speech caused material, substantial disruption in the work place. **(App. at 30-40)**

The first amendment claim was subsequently tried on June 29, 1992 - July 2, 1992 and the jury returned its verdict **(R. # 39)** on July 2, 1992, awarding the plaintiff damages. Although it questioned whether the defendants should be allowed to "resum[e] their argument" from their rejected motion for summary judgment after a full trial on the merits, the Court of Appeals carefully addressed and rejected application of **Elrod/Branti** to cases where plaintiffs' political association is in no way implicated in the discharge. **Marshall v. Porter County Plan Com'n**, 32 F.3d 1215, 1220-21 (7th Cir. 1994) **(App. at 7-9)**.

SUMMARY of the ARGUMENT

This case involves a government employee who was discharged because she spoke out on matters of public concern. Both the trial court and the Court of Appeals correctly analyzed the case under the **Pickering/Connick** line of cases decided by this Court and concluded that policymakers are not excluded from first amendment protection when they speak out on matters of public concern, solely because of their status as a policymaker. Rather, their status is one of the factors to be considered in applying the **Pickering** balance, but it is not determinative.

While, as recognized by the Court of Appeals, there may be some disagreement among the circuits about the relationship between the **Pickering/Connick** cases and the **Elrod/Branti** cases where "an employee's speech reflects his or her political associations," so-called hybrid cases where speech and political associational rights are intertwined, 32 F.3d at 1220-21, there is not a conflict in the circuits that would lead to a different result in this case, which did not involve political speech or association. This Court has never suggested that the **Elrod/Branti** exception

for policymakers should be extended to free speech cases under the **Pickering/Connick** line of cases. To the contrary, in **Pickering** this Court recognized that whether a statement "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary," is only one of the factors to be considered. Because the Court of Appeals properly applied the controlling decisions of this Court, this case does not come close to fitting within the considerations governing review on writ of certiorari under Rule 10 of the rules of this Court.

ARGUMENT

A policymaker who speaks out about abuse of public office and wrongdoing by members of the county plan commission and the county building inspector is protected from a retaliatory discharge under this Court's well-established interpretation of the first amendment

The defendants argue that because Ms. Marshall was a policymaker whose position would not be protected from a politically-motivated termination, she may be discharged for speaking on matters involving her employer, without regard to whether those matters were of public concern and whether her

speech created material, substantial disruption in the workplace. Although both the political patronage cases and free expression cases required this Court to balance governmental interests against the first amendment rights of government employees, it developed separate and distinct legal theories for evaluating free speech and free association claims.

In **Elrod v. Burns**, 427 U.S. 347 (1976), and **Branti v. Finkel**, 445 U.S. 507 (1980), the Court reasoned that the government's interest in insuring that the policies of elected officials are implemented justifies a rule limiting the associational rights of governmental employees who occupy policymaking positions. Because the employee's associational interests and the public employer's "loyalty" interest are essentially fixed and unvarying when it comes to policymakers in political patronage cases, there is no need for further balancing in such cases. Patronage cases implicate an interest in structuring government according to the will of the electorate, and where "harmonious" political affiliation is required "for effective performance of the office," **i.e.**, for most policymaking and confidential appointments,

political association rights are forfeited. There is nothing magical about the "policymaking" label; rather, the Court has simply held that government meets its difficult burden of establishing a compelling government interest whenever it proves that political affiliation is an appropriate requirement for effective performance of the office involved.

In sharp contrast, **Pickering v. Bd. of Education**, 391 U.S. 563 (1968), and its progeny require courts to balance the employee's speech rights (and the public's right to the employee's information) against the government's interest in providing services without disruption. Because the content of the speech and the surrounding circumstances are so varied, courts must balance competing interests on a case-by-case basis. If, looking to the content, form, and context of the speech, it is determined that the speech addresses a matter of public concern, then the courts apply the **Pickering** balance that takes into account the functioning of the office, including the specific work-relationships. In short, in the context of political patronage cases, this Court in **Branti** and **Elrod** found that government had a compelling interest in

infringing upon the freedom of association rights of government employees whose political affiliation was necessary for the effective performance of the job. On the other hand, where government employees overtly express ideas, this Court has determined that the employees' right to engage in protected expression must be balanced against the government's interest in suppressing the particular speech in question.

The need to engage in the **Pickering** balance is reflected in several recent decisions. In **Rankin v. McPherson**, 483 U.S. 378 (1987), this Court states that **Pickering** requires it to "balance McPherson's interest in making her statement against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees'". **Id. at 388.** This Court, in **Connick v. Myers**, 461 U.S. 138 (1983), held that the "State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests." **Id. at 150.** Thus, plaintiff is not suggesting there is a

hierarchy among first amendment expression rights. Rather, the compelling interest standard simply yields a different result depending upon the nature of the first amendment activities involved.

This Court has never suggested that a government employee's status as a policymaker alone justifies suppression of speech in all cases. Unlike the patronage situation, the Court has recognized both that "speech" has the potential for being more disruptive than "passive association" and that the public has a strong competing interest in seeing that government employees, even those who occupy high-ranking positions, speak freely. By penalizing such speech, the public is deprived of essential information necessary for the effective, efficient operation of government. As this Court explained with regard to the teachers in **Pickering**, these employees are "the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak freely on such questions without fear of retaliatory discharge." 391 U.S. at

571-72. This Court emphasized that the public has an interest in "[f]ree and unhindered debate on matters of public importance." **Id. at 573.**

These principles were reaffirmed in **Waters v. Churchill**, 114 S.Ct. 1878 (1994), where this Court noted that "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinion." **Id. at 1887. See also Wilbur v. Mahan**, 3 F.3d 214, 215 (7th Cir. 1993) ("[a] subordinate of a public official is ideally suited to be an effective critic" because he "acquires knowledge about the intimate operation of the office"); **O'Donnell v. Yanchulis**, 875 F.2d 1059, 1062 (3rd Cir. 1989) ("[t]he public has a significant interest in encouraging legitimate whistleblowing so that it may receive and evaluate information concerning the alleged abuses of ... public officials"); **Conaway v. Smith**, 853 F.2d 789, 797 (10th Cir. 1988) (an employee's first amendment interest is entitled to greater weight where he is acting as a whistleblower in exposing government corruption).

In this case plaintiff's speech exposed wrongdoing and corruption in government - speech which has been held to be entitled to the greatest protection. **See, e.g., Garrison v. Louisiana**, 379 U.S. 64, 74-75 (1964). **Compare Connick, supra**, 461 U.S. at 148 (rejecting Myers' free speech claim where her allegations did not "bring to light actual or potential wrongdoing or breach of public trust" on the part of the defendants). In the political patronage situation there is simply no competing government interest of the same magnitude. Thus, although government has been found to have a compelling interest in suppressing or sanctioning political affiliation where such affiliation interferes with the employee's ability to perform, this Court has never held that government's interest in suppressing speech which the public needs to know - even if the source is a policymaker - inevitably meets this same strict scrutiny standard.

Ms. Marshall is not suggesting that policymaking status is irrelevant. Indeed, this Court in **Pickering** recognized that the state's interest in the efficient, effective performance of its office requires an inquiry into whether the relationship between the

employee and the employer against whom she spoke was a close one which required personal loyalty or confidence. 391 U.S. at 570-71. However, this factor was listed as merely one of five that should be considered in deciding whether free speech rights outweigh the government's interest.[1] Further, in **Rankin v. McPherson**, **supra**, 483 U.S. at 390-91, this Court noted that the public and confidential nature of an employee's position affects the relevant weights in the **Pickering** balance.[2] However, neither case suggests that this consideration alone should control the outcome. In fact, this Court in **Pickering** specifically rejected a categorical approach based merely on the status of the employee. The Court wrote "[b]ecause of the enormous variety of fact situations in which critical statements by . . . public employees may be thought

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[1]Other factors cited include the speech's effect on discipline by the employee's immediate supervisors, its effect on harmony among the employee's co-workers, its effect on the employee's job performance, and its impact on the general operation of the employer's enterprise. 391 U.S. at 570-73.

[2]The Court noted that where an employee does not serve a confidential, policymaking role there is less danger that the speech will cause disruption.

by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard". 391 U.S. at 569. Similarly, although the relevancy of this factor was cited in **Rankin**, the Court also stressed that the public employer had the burden of showing that its interest in promoting the efficient performance of its services outweighs the employee's speech interests. 483 U.S. at 388.

Finally, in **Connick**, although plaintiff was an assistant district attorney, arguably a policymaking, confidential employee, there is no discussion of this factor in the Court's analysis. **See also Piesco v. City of New York Dept. of Personnel**, 933 F.2d 1149, 1157 (2nd Cir.), cert den. 112 S.Ct. 331 (1991) (district court attached too much significance to plaintiff's senior position; although such is relevant to the **Pickering** balance, this factor was outweighed by the employee's interest in testifying truthfully before a legislative committee about government wrongdoing). In short, in assessing the protected status of the speech, the individual's status as a policymaker is, as the trial court below stated in its June 18, 1992 Order **(App. at 40)**, "one of several

factors that are to be considered in making the **Pickering** balancing."

Neither the Seventh Circuit, nor indeed any circuit, has ever adopted the position that the defendants ask this Court to embrace. In **Wilbur v. Mahan**, 3 F.3d 214, 215 (7th Cir. 1993), upon which the defendants rely heavily in their petition, the court specifically rejected any broad principle denying first amendment protection to policymakers:

> [t]he defendant claims the right to fire a confidential or policymaking employee on *any* ground. Interpreted literally, this is a questionable position . . . . The patronage cases . . . do not hold that an individual surrenders all of his freedom of speech by becoming a confidential or policymaking employee of government.

3 F.3d at 217.

Rather, **Wilbur** involved a "hybrid" situation where overt speech and political association rights overlapped because the plaintiff not only engaged in partisan politics, he actually ran against his boss. At issue was the validity of a regulation providing that an employee who runs against the sheriff may be placed on unpaid leave of absence until the election. The court

recognized that the concerns that give rise to the policymaking exception to the patronage cases are in the forefront in this type of situation: "[t]he declaration of candidacy in these circumstances is a declaration of war. . . . If as here the candidate occupies a confidential or policymaking position under the boss, the political enmity that candidacy is certain to engender entitles the boss to fire him." **Id. at 218.**

Since the patronage cases are based on the assumption that disruption or disturbance is inevitable where a government employee in a policymaking position is endorsing policies contrary to those of her boss, the court in **Wilbur** concludes that in this analogous situation there really is no need to go through the **pro forma** step of a **Pickering** balance. Because of the disruptive potential inherent in this type of situation, the court concludes that legal proofs are unnecessary in light of experience and common sense: ". . . a declaration that the subordinate means to run against the official at the next election is the height of disloyalty." **Id. at 218-19.** In short, the court in **Wilbur** concludes that under the

circumstances of this hybrid case the **Pickering** balance will inevitably be struck in favor of the governmental interests.

In support of their petition, defendants rely on the conflict between the Seventh Circuit's position in **Wilbur** and the Eleventh Circuit's use of **Pickering**'s open-ended, fact sensitive approach in **Stough v. Gallagher**, 967 F.2d 1523, 1527-28 (11th Cir. 1992), which involved demotion of a captain in the Sheriff's organization based on his political speech supporting the Sheriff's opponent. The purported conflict between these two circuit decisions is irrelevant to the facts in this case, which in no way involve partisan political speech. Most significantly, the government interests here are of an entirely different magnitude. The public's need to hear differing political philosophies as to how government should be run and who is the best candidate to administer that office is surely less important than the public's need to learn about government corruption and wrongdoing. Congress has recognized this difference in enacting the Hatch Act, which bars government employees from engaging in partisan political activities while at the same time legislating to protect "whistleblowers" who expose

government wrongdoing. **See** 5 U.S.C. §§ 1221-22; 2302. To hold that a government employee's speech can be proscribed no matter what the content of the speech and no matter what the employee/employer situation, is to cut off public debate on speech which lies at the core of the first amendment - speech which is necessary to democratic self-government. This Court in **Garrison**, **supra**, 379 U.S. at 74-75, stated that "speech concerning public affairs is more than self-expression, it is the essence of self-government."

Unlike the situation in **Wilbur**, the plaintiff here was not running against her superior and, in fact, the "employer" here was a Board that was not involved in the day-to-day operation of the office. Furthermore, in this case the record disclosed no evidence of material, substantial disruption caused by the plaintiff's speech, nor are defendants claiming that anything in the record demonstrates a "potentially disruptive situation." **Compare Ohse v. Hughes**, 816 F.2d 1144, 1152-54 7th Cir. 1987), cert den. 484 U.S. 1025 (1988) (although plaintiff's speech would inevitably undermine her supervisor's authority and hinder close working

relationships, the matters were of high public importance and there was no evidence that the speech interfered with plaintiff's responsibilities at the office or working relationships with other employees). In short, the defendants' proposed broad theory finds no support in case precedent and actually runs contrary to public policy arguments reflected in both this Court's opinions and in congressional enactments. The lower courts gave the proper weight to Ms. Marshall's status, and in light of all the factors, struck the proper balance.

It is apparent from what has been said above that the defendants have not fit this case within the considerations governing review on writ of certiorari under Rule 10 of the rules of this Court. First, the decisions of the lower courts are entirely consistent with the controlling precedent of this Court. What the defendants seek is an extension of the policymaker exception articulated in the **Elrod/Branti** cases to the **Pickering/Connick** line of free speech cases. The Seventh Circuit's rejection of this argument is not contrary to a holding of any other circuit.

Second, while the Court of Appeals below recognized a difference in how the circuits view the relationship between these two lines of cases in "hybrid" situations involving partisan political speech, 32 F.3d at 1220-21, this is not a difference that applies to the facts in this case. Further, because the approach of the Seventh Circuit, under which the defendants argument was rejected, is more friendly to the defendants than the other approach, a resolution of the different approaches in the circuits would not affect the outcome in this case. Therefore, there is not a conflict in the circuits that makes a difference in this case.

CONCLUSION

For the reasons stated above, it is clear that the court of appeals properly applied the controlling decisions of this Court and there is no conflict in the circuits that would affect the outcome in this case. Therefore, the petition for writ of certiorari must be denied.

Ivan E. Bodensteiner
7 Napoleon Street
Valparaiso, IN 46383
(219) 464-1162
Counsel of Record

Rosalie B. Levinson
122 W. 79th Avenue
Merrillville, IN 46410
(219) 769-1164

Attorneys for Respondent